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No. 99-10

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL K. LEGGETT

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Counsel of Record:
Professor Timothy P. O'Neill
John Marshall Law School
315 S. Plymouth Court
Chicago, IL 60604
(312) 987-2367

QUESTION PRESENTED FOR REVIEW

SINCE THE RIGHT TO TESTIFY IS A FUNDAMENTAL RIGHT POSSESSED BY A CRIMINAL DEFENDANT, WHAT MUST A TRIAL COURT DO TO GUARANTEE THAT A CRIMINAL DEFENDANT ACTUALLY DECIDES FOR HIMSELF WHETHER OR NOT TO TESTIFY AT HIS OWN TRIAL?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) files this amicus brief pursuant to this Court's Rule 37.2(a) in support of Michael K. Leggett's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit. Both petitioner and respondent have granted amicus NACDL consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF AMICUS

NACDL is a nonprofit corporation with over 10,000 attorneys and 28,000 affiliated members in all fifty states. The NACDL was founded in 1958 to advance the study of the theory and practice of criminal law, to publish on the subject of criminal practice, and to promote the integrity, independence and skill of the criminal defense bar. One objective of NACDL is to ensure that defense attorneys have the ability to provide zealous representation to their clients, as required by the Sixth Amendment to the United States Constitution. In particular, one of the concerns of NACDL is to ensure that defense counsel have the ability to aggressively and effectively represent their clients, without the threat of criminal prosecution under broadly

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and its members, made any monetary contribution to its preparation or submission.

drafted criminal charges. Otherwise, the government may use its prosecutorial discretion to chill zealous representation.

SUMMARY OF THE ARGUMENT

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court explicitly held that a defense at a criminal trial has a constitutional right to testify on her own behalf. This holding came as no surprise, since this Court had often suggested in dicta that such a right exists.

It is now the task of American courts to vindicate this right.

First, it must be recognized that the right to testify is a personal right of the defendant. This means that the decision to testify cannot be characterized as merely a "tactical" decision left to defense counsel. Rather, in both *Rock v. Arkansas* and *Jones v. Barnes* this Court strongly suggests that this crucial decision must be made personally by the defendant.

But in order for the defendant to exercise this right, he must first be aware he has such a right. Thus, a mechanism must be established so that the trial judge and/or defense counsel properly informs the defendant of this right. The defendant must understand that he or she is ultimately responsible for this decision. Finally, if the defendant chooses not to testify, the record must contain a voluntary, knowing, and intelligent waiver from the defendant. A silent record can no longer substitute for a constitutionally proper personal waiver.

REASONS FOR GRANTING WRIT

This court has held that the defendant in a criminal case has a constitutional right to testify in his own defense. *Rock v. Arkansas*, 483 U.S. 44 (1987). It has characterized this right as being "fundamental". *Rock*, at 52. This court has also indicated in very strong dictum that the decision whether to testify is one of the few that resides solely with the defendant. *Jones v. Barnes*, 463 U.S. 745 (1983). And, the waiver of a fundamental right should be made knowingly, intelligently, and voluntarily. *Johnson v. Zerbst*, 304 U.S. 458 (1937).

Thus, it appears settled that the decision to testify is a right that belongs solely to the criminal defendant. Yet years ago this court astutely observed that "[A] right without a remedy is no right at all." *Angel v. Bullington*, 330 U.S. 183, 209 (1947). As the facts of this case illustrate, judicial assurances to a defendant that he alone may decide whether to testify are simply empty promises if there is no mechanism for determining what the defendant really wants. This court should grant the petition for certiorari in this case to demand that trial judges must obtain personally from a criminal defendant a knowing, intelligent, voluntary, in-court waiver of the right to testify, at least in those cases where the judge is put on notice that there may be a disagreement between defense counsel and defendant on this issue.

I.

ROCK v. ARKANSAS MADE EXPLICIT WHAT HAD LONG BEEN IMPLICITLY RECOGNIZED BY THIS COURT: THAT A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO TESTIFY ON HIS OWN BEHALF

In a narrow sense, it is accurate to say that *Rock v. Arkansas*, 483 U.S. 44 (1987) is the first case in which this Court *explicitly* held that a defendant has a constitutional right to testify at her trial. But it is certainly not a "new rule" as that term of art is defined in *Teague v. Lane*, 489 U.S. 288 (1989). *Rock* was simply the first time this Court was forced to specifically recognize this fundamental constitutional right.

There has been no dearth of language in this Court's opinions establishing that some kind of "right to be heard" is an essential component of due process. Thus, in 1897 the Court declared: "At common law no man was condemned without being afforded opportunity to be heard. . . . Can it be doubted that due process of law signifies a right to be heard in one's defence?" *Hovey v. Elliott*, 167 U.S. 409, 415, 417 (1897). The following year, the Court said that the concept of due process included "certain immutable principles of justice . . . as that no man shall be condemned in his person or property without . . . an opportunity of being heard in his defense." *Holden v. Hardy*, 169 U.S. 366, 389-390 (1898). This statement was approvingly cited by the Court in *Powell v. Alabama*, 287 U.S. 45, 68 (1932). In dictum in *In re Oliver*, 333 U.S. 257 (1948), the Court provided details on just what this "right to be heard" entailed. The Court said it "include[d], as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *Id.* at

273 (emphasis added). Again, in *Walder v. United States*, 347 U.S. 62 (1954), the Court alluded to a right to testify when it stated, "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him." 347 U.S. at 65.

In the years prior to *Rock*, the Court continued to suggest that the right to testify was constitutionally predicated. In *Harris v. New York*, 401 U.S. 222 (1971), the Court stated that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." 401 U.S. at 225 (1971). The next year in *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court stated that "[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." 406 U.S. at 612. In 1975 the Court wrote that "[I]t is now accepted . . . that an accused has a right . . . to testify on his own behalf." *Faretta v.California*, 422 U.S. 806, 819, n. 15 (1975) (*citing Harris v. New York*, 401 U.S. 222, 225 (1971)). When the majority opinion in *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), averred that the Court had "never explicitly held that a criminal defendant has a due process right to testify on his own behalf", Justice Blackmun responded in his concurrence that he was "somewhat puzzled" by the majority's assertion that this could be an "open question" and reviewed the Court's earlier work in this field. 475 U.S. at 186, n. 5 (Blackmun, J., concurring).

Thus, *Rock* is a constitutional anti-climax. The Supreme Court had long indicated that a constitutional basis for a defendant's right to testify was a foregone conclusion.

II.

THE DECISION TO TESTIFY IS A PERSONAL DECISION WHICH CAN ONLY BE MADE BY THE DEFENDANT HIMSELF

Whether or not a defendant testifies is one of the limited number of trial decisions to important that only the defendant can make it.

The mere fact a defendant has a constitutional right does not mean that the defendant must personally exercise that right. For example, a defendant has a constitutional right both to call witnesses and to cross-examine the State's witnesses. Yet these are characterized as "strategic and tactical decisions" which are commonly exercised by defense counsel. See ABA Standards for Criminal Justice, Standard 4-5.2(b) (3d ed. 1993).

On the other hand, some rights are so basic that only the defendant himself may waive them. For example, a jury trial can be waived only with a criminal defendant's "express, intelligent consent." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277 (1942); *accord, Patton v. United States*, 281 U.S. 276 (1930). A guilty plea cannot be taken without the defendant's personal agreement. *Boykin v. Alabama*, 395 U.S. 238 (1969). The decision whether or not to appeal a conviction belongs solely to the defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (dictum).

Rock v. Arkansas had no reason to decide whether the right to testify is the kind of right which requires a personal waiver for the defendant or whether it is in the area of "trial tactics" to be left to the defense attorney. Yet

Rock strongly suggested that only the defendant may make this decision.

First, *Rock* characterized the defendant's right to testify as a "fundamental" constitutional right. 483 U.S. at 53, n. 10. Similarly, when the Supreme Court in *Johnson v. Zerbst*, 304 U.S. 458 (1938), formulated its watershed test for establishing waivers by a defendant, it spoke in terms of "fundamental constitutional rights." 304 U.S. at 464. As one commentator has noted, "[I]t appears that the decisive factor in the decision to require personal waiver is the fundamental nature of the right at stake." Developments in the Law - Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1111 (1970).

Second, when *Rock* characterized the right to testify as a "fundamental" constitutional right, it cited *Jones v. Barnes* and accompanied that citation with the following parenthetical: "(defendant has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf)." 483 U.S. at 53, n. 10. Although not necessary to the decision in *Rock*, this statement certainly appears to support the right of the defendant to personally make the decision whether or not to testify.

Third, a careful examination of *Jones v. Barnes* lends additional weight to this position. The statement in *Jones* that a defendant has ultimate authority on the decision to testify is dictum. 463 U.S. at 751. Yet the Court supports this dictum with two citations. One is to a statement to this effect in *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C.J., concurring). The second is to the Second Edition of the American Bar Association Standards for Criminal Justice which states that the decision whether to testify is for the accused to make

personally. ABA Standards For Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980).

The American Bar Association has maintained its position that this is a decision for the defendant alone. In the Second Edition of the Standards published in 1980, the A.B.A. recognized only three areas left to the ultimate decision of the defendant: what plea to enter, whether to waive jury trial, and whether to testify in his or her own behalf. Id. The Third Edition of the Standards reiterates its support for a personal decision in these three areas and adds two more: whether to accept a plea agreement and whether to appeal. A.B.A. Standards for Criminal Justice, Standard 4-5.2(b)(3d ed. 1993).

Indeed, the Second Circuit has noted that every Circuit which has considered the question has characterized the right to testify as one which only the defendant himself may waive. *Brown v Artuz*, 124 F.3d 73, 77 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 1077 (1998).

Thus, the nature of the right to testify will not support a waiver being made by an attorney. Only the defendant himself can waive this fundamental constitutional right.

III.

THERE IS A NEED FOR A MECHANISM TO GUARANTEE THAT THE DEFENDANT BOTH UNDERSTANDS HIS RIGHT TO TESTIFY AND, IF HE WAIVES THE RIGHT, DOES SO VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY

Since only the defendant can waive the right to testify, there is a need for the trial court to determine whether the non-testifying defendant is indeed making such a waiver. There are essentially two types of such systems: one in which the trial court takes an active role in making this determination and one in which the defense attorney plays the most important role.

The first type of system is used in both Colorado and West Virginia. A good description of such a system is found in the Colorado case establishing it, *People v. Curtis*, 681 P.2d 504 (Colo. 1984). There the Colorado Supreme Court assigned the trial judge the burden of ascertaining whether the defendant has properly exercised such a waiver, and established the following procedure:

> "A trial court . . . [should] advis[e] the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him, that if

> he has been convicted of a felony the prosecutor will be entitled to ask him about it and thereby disclose it to the jury, and that if the felony conviction is disclosed to the jury then the jury can be instructed to consider it only as it bears upon his credibility. . . . [T]he defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right."

681 P.2d at 514.

The Colorado approach was adopted in West Virginia (*State v. Neuman*, 371 S.E.2d 77 (W. Va. 1988)) and has received favorable comment in Mississippi. *See Culbertson v. State*, 412 So.2d 1184, 1186-87 (Miss. 1982)(Colorado system suggested but possibly not required). Recently, Alaska, Hawaii, and Wyoming have also stressed the need for an on-the-record waiver of the right to testify. (See Petition, pages 15-16).

Yet in response to criticism that this procedure may result in the trial judge inadvertently influencing a defendant's decision, an alternative system has been proposed to guarantee a proper on-the-record waiver for a non-testifying defendant. See Timothy P. O'Neill, Vindicating the Defendant's Constitutional Right to Testify at a Criminal Trial: The Need for an On-the-Record

Waiver, 51 U. Pitt. L. Rev. 809 (1990). This alternative system is comprised of the following six steps:

1. At ever criminal trial, the defendant must either a) testify on his own behalf or b) waive his right to testify on the record.

2. Consistent with A.B.A. Standards, it is the responsibility of the defense attorney to tell the defendant a) that the defendant has the right to testify and b) that, although the defense attorney will offer advice on this matter, the ultimate decision of whether to testify rests with the defendant.

3. If, after weighing the advice of counsel, the defendant decides not to testify, it is the responsibility of the defense attorney to request a hearing outside the presence of the jury at some point during the defense case.

4. At this hearing, through questions posed by the defense attorney, the defendant should affirm that a) he understands he has the right to testify; b) that he understands that no one can prevent him from exercising this right; c) that if he testifies the prosecutor will have the opportunity to cross-examine him; and, if applicable, d) that there is a possibility that his testimony might be impeached with prior criminal convictions. His waiver should then be made orally as part of the trial record.

5. A written waiver should also be made part of the trial record.

6. As a general rule, the prosecution and the trial judge should play no role in the proceedings. However, the trial judge may pose questions to the defendant and/or the defense counsel if the judge, in her

discretion, believes that there is evidence that the defendant is not making a knowing and intelligent waiver of the right to testify.

The preceding two systems are merely examples. Yet *some* mechanism is needed to vindicate this fundamental right. A mechanism is especially necessary in cases such as the one at bar where the trial judge is apprised both of the defendant's wish to testify and of the defense attorney's opposition to this decision. (See Petition, App. 25-29). It is not enough for the trial judge to say, as did the judge in the case at bar, that he did not want to raise the issue in open court because he was afraid the defendant "might jump up and say he wanted to testify." (Petition, App. 29). It is imperative that this Court provide guidance on how trial courts should act to vindicate this most precious of rights.

CONCLUSION

For the foregoing reasons, NACDL urges this Court to grant the writ of certiorari to address the important issues presented.

Respectfully submitted,

Counsel of Record:
Timothy P. O'Neill
Professor of Law
The John Marshall Law School
315 S. Plymouth Ct.
Chicago, IL 60604
(312) 987-2367